No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE EATON CORPORATION, *Petitioner*

v.

OLGA J. FOX, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, the Eaton Corporation, prays that a writ of certiorari issue to review a judgement of the United States Court of Appeals for the Sixth Circuit reversing a judgment of the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 615 F.2d 716 (6th Cir. 1980); it is set forth as Appendix B, *infra* pp. 5a.-14a. The opinion of the District Court is set forth in Appendix A, *infra* pp. 1a-4a.

JURISDICTION

The judgment of the Sixth Circuit was entered on February 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the doctrine of tolling is appropriate to the statutory scheme of Title VII of the Civil Rights Act of 1964 and the time periods for suit set forth therein, and if so what the reach and application of that doctrine are?

STATUTE INVOLVED

Section 2000e-5(f)(1) of Title 42 of the United States Code provides in pertinent part:

> . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and *within ninety days after the giving*

> *of such notice a civil action may be brought against the respondent* named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. (Emphasis added.)

STATEMENT

In this case, the United States Court of Appeals for the Sixth Circuit, in a 2-1 decision, has decided that a plaintiff who admittedly has failed to comply with the ninety-day requirement for filing suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), may be excused from the stated requirement of that section if she has instead pressed the claim in a state court, under a mistaken but "reasonable" impression that she could litigate her Title VII claim in such a forum (App. 12a), even though the state court lacked jurisdiction to entertain her claim.

The Sixth Circuit ruled that in such a situation the period for filing the Title VII suit is tolled, despite the acknowledged absence of any circumstances establishing that the plaintiff was misled or otherwise prevented from filing her claim in a court possessing jurisdiction. Distinguishing this Court's decisions in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), in which the Court refused to rule that filing periods had been tolled in a 42 U.S.C. § 1981 case and a Title VII case, respectively, the Sixth Circuit instead relied upon decisions of this Court from the FELA and general class action areas for authority for imposition of the tolling

doctrine (App. 10a, n.6.). Although the opinion below closed by characterizing the holding as "not a broad one" (App. 12a), the decision, in its imposition and application of a tolling doctrine under Title VII, goes far beyond this Court's most recent analysis of the issue in the *Robbins & Myers, Inc.* case, *supra,* and does so in the wake of this Court's more recent 4-4 affirmance without opinion in *Shell Oil Co. v. Dartt,* 434 U.S. 99 (1977) (Justice Stewart not participating), *rehearing denied* 434 U.S. 1042 (1978), where certiorari was granted with respect to very similar tolling questions involving substantially identical issues but where no resolution of those issues was achieved.

PROCEEDINGS BELOW

In October of 1973, respondent, plaintiff below, filed suit in an Ohio state court, claiming breach of a collective bargaining agreement by virtue of defendant-petitioner's release of plaintiff from employment on August 30, 1972. Following plaintiff's receipt of a Title VII right-to-sue letter in December of 1974, plaintiff amended her complaint to allege a claim of sex discrimination under Title VII. Following trial in the Ohio state court, judgment was entered in favor of the defendant, and that judgment was affirmed by Ohio's intermediate appellate court. On appeal to the Supreme Court of Ohio, however, that court, *sua sponte,* held that its state courts lacked jurisdiction over Title VII actions and dismissed the action for lack of subject matter jurisdiction. *Fox v. Eaton Corp.*, 48 Ohio St. 2d 408, 358 N.E.2d 536 (1976).

Plaintiff, on February 18, 1977, filed the within Title VII action in the United States District Court for the

Northern District of Ohio, alleging essentially the same facts as she had alleged in the Title VII count of her state court action. The federal court action was, as the Sixth Circuit noted, timely filed if the ninety-day requirement of Title VII was tolled during the pendency of the Title VII claim in state court (App. 7a, n.2). The Sixth Circuit specifically pointed out that, although the parties had stipulated to the bringing of the action in state court, plaintiff had made no claim of having been misled into filing in state court and had made that decision on "her own" (App. 9a, n.5), and did not suggest that plaintiff was in any other respect prevented from timely filing her action in a court having jurisdiction to hear the claim.

The trial court dismissed the action on the ground that plaintiff had failed to comply with the ninety-day suit requirement of Title VII, holding that the time periods established under Title VII were jurisdictional and could not be tolled, and indicating that even if a tolling doctrine were applicable such tolling would not be appropriate under the circumstances of the case. The Sixth Circuit reversed, squarely holding in a 2-1 decision that the tolling doctrine could be imposed on Title VII's time requirements, and ruling that such doctrine applied even absent any misleading of plaintiff or any prevention of timely suit by plaintiff in a proper court. The court took the position that such tolling is appropriate where a plaintiff's late filing is admittedly the result of the plaintiff's own mistake, so long as the error is the result of plaintiff's "reasonable belie[f]" in the correctness of the erroneous position (App. 13a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for the purpose of definitively resolving the important question of whether Title VII's time requirements permit imposition of a tolling doctrine, and, if so, for the purpose of furnishing lower courts with some guidance as to the reach and application of such a doctrine. While this Court's dictum in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), touched upon the issue of tolling in respect of Title VII's time requirements, as subsequent Courts of Appeals decisions reveal, even what was said by way of dictum in *Robbins & Myers, Inc.* falls short of sufficiently addressing for those courts the basic question whether Title VII's time requirements permit a tolling doctrine. Moreover, if that decision can be read as permitting tolling, it does not furnish enough guidance with respect to the nature and application of the tolling doctrine in the Title VII statutory scheme. Indeed, subsequent to the dictum in *Robbins & Myers, Inc.*, the Court granted certiorari in *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977) (*per curiam affirmance by a divided Court*), *rehearing denied*, 434 U.S. 1042 (1978), for the apparent purpose of resolving controlling tolling issues, but those issues were left unresolved when the Court split evenly.[1]

Decisions of this Court which preceded *Robbins & Myers, Inc.* appeared to point away from any imposition of a tolling doctrine on Title VII's time requirements, by

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[1] Although *Dartt* arose under 29 U.S.C. § 626(d) of the Age Discrimination in Employment Act of 1967, the time requirements of that section closely parallel those of Title VII, and the *Dartt* cases are therefore being cited by Courts of Appeals as applicable to the question of whether tolling is permitted under Title VII. *See Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295 (5th Cir. 1979); *Cottrell v. Newspaper Agency Corp.*, 590 F.2d 836, 838 (10th Cir. 1979); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978).

characterizing such requirements as "jurisdictional," in a context in which there was at least a suggestion that failure to meet such requirements would result in dismissal of a Title VII suit. Thus, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793-94 (1973), the Court, in unanimously refusing to hold that the absence of an EEOC finding of reasonable cause barred suit under Title VII, expressly referred to the plaintiff's compliance with the time requirements of Title VII as having "satisfied the jurisdictional prerequisites to a federal action," and refused to "engraft on the statute" an additional requirement of that kind inhibiting the review of Title VII claims. Similarly, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), a unanimous Court, in ruling that submission of a discrimination claim to labor arbitration did not bar a subsequent Title VII suit, expressly referred to Title VII's time requirement provisions as specifying "with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." Contrasting a proposed implied requirement that a plaintiff's claim be free from prior arbitration with the express time requirements of Title VII, the Court ruled that there was no suggestion in the Title VII statutory scheme that failure to comply with this proposed implied requirement "either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Ibid.* *See also Johnson & Railway Express Agency*, 421 U.S. 454 (1975).

Particularly against the backdrop of these earlier decisions, it is difficult to regard *Robbins & Myers, Inc.*, *supra*, as having authoritively decided the issue of the appropriateness of the tolling doctrine to the Title VII time requirements. As the four concurring Justices noted, 429 U.S. 229, 244, the case was decided on the basis of the

retroactivity of the new 180-day charge period in respect of plaintiff's claim, and the majority's discussion of the tolling doctrine was dictum. Moreover, discussion of that doctrine by the majority was less than positive about the tolling doctrine's being part of the Title VII statutory scheme. While it is true that the majority distinguished *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1968), on the ground that that decision had involved a situation where the plaintiff would otherwise have been "prevented" from filing an FELA claim, there is far more in the dictum which points away from the existence of a tolling doctrine for Title VII time requirements. Thus, the majority in *Robbins & Myers, Inc.* not only cited its prior decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), favorably, but also declared that "we think that petitioners' arguments for tolling the statutory period for filing a claim with the EEOC during the pendency of grievance or arbitration procedures under the collective bargaining contract are virtually foreclosed by our decisions" in those cases. 429 U.S. 229, 236. The majority went on to underscore the binding nature of Title VII's time requirements by emphasizing that the Court in *Alexander v. Gardner-Denver Co., supra*, had "defin[ed] Title VII's jurisdictional prerequisites 'with precision,'" and by stating that Congress "gave no indication that it considered a 'slight' delay ... acceptable," and "did not leave to courts the decision as to which delays might or might not be 'slight.' " 429 U.S. 229, 240. It was no doubt such statements in *Robbins & Myers, Inc.* which caused this Court later, in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555, n. 4 (1977), to cite both *Alexander v. Gardner-Denver Co., supra*, and *Robbins & Myers, Inc.*, for the proposition that "timely filing is a prequisite to the maintenance of a Title VII action."

It is not surprising, therefore, that *Robbins & Myers, Inc.* and its predecessors and successors, have created substantial confusion among the Circuits with respect to both the very existence of a tolling doctrine in the context of Title VII and, in those cases where Circuit Courts have opted for the doctrine, with respect to its reach and application. Indeed, despite the Sixth Circuit's decision in the instant case, even that court, less than six months earlier and subsequent to *Robbins & Myers, Inc.*, while opting for the tolling doctrine in the context of a clear misleading of the plaintiff, candidly acknowledged in *Leake v. University of Cincinnati*, 605 F.2d 255, 259 (6th Cir.), *rehearing in banc denied*, Oct. 10, 1979, that "the Supreme Court has not squarely addressed the precise issue presented here; that is, whether Title VII time periods may be tolled on equitable grounds." 605 F.2d 255, 259.

Contrary to the Sixth Circuit's broad imposition of the tolling doctrine in the instant case, two Circuits, the First and the Second, have analyzed *Robbins & Myers, Inc.* and other decisions of this Court touching upon the tolling doctrine problem and have flatly ruled that the various Supreme Court decisions to date leave the matter an "open question." In *Daughtry v. King's Dept. Stores, Inc.*, 608 F.2d 906, (1st Cir. 1979) (*per curiam*), the First Circuit, citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 (1977), for the proposition that failure to comply with Title VII's time requirements is a "procedural prerequisite to the District Court's entertaining the case," which "precluded relief under the statuory scheme in the District Court," 608 F.2d 906, 908, noted as well this Court's references in *Robbins & Myers, Inc.*, to "jurisdictional prerequisites," *ibid.*, and concluded by

declaring "the entire statute of limitations and jurisdictional requirements issue open for another day." *Id.* at 909.

The Second Circuit in *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2d Cir. 1978), while also concluding that the Court's decisions left the tolling issue "still open in this Circuit," 571 F.2d 102, 109, was even more suggestive of doubt as to the doctrine's place in the Title VII statutory scheme than the First Circuit in *Daughtry v. King's Dept. Stores, Inc., supra.* Thus, in *Smith* the Second Circuit cited the pre- *Robbins & Myers, Inc.*, decisions of this Court and language from *Robbins & Myers, Inc.*, itself, and described footnote 10 of *Robbins & Myers, Inc.*, as having simply "left open the possibility" of a tolling doctrine in a decision which also "strongly suggests that, even assuming the Title VII time limits are not strictly jurisdictional, the tolling of those limits may be very restrictive." 571 F.2d 102, 109.

While the Seventh Circuit, in *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142 (7th Cir. 1978), did not squarely face the tolling question, that court did decide whether the time limits of Title VII were jurisdictional in a context which indicates that that Court may well disagree with the Sixth Circuit with respect to the tolling issue decided in the instant case. In ruling that Title VII's time limits established jurisdictional prerequisites to suit, so that such time limits could be asserted at any time, the court said:

> The critical issue is whether the 90-day period is in the nature of a statute of limitations in which case the doctrines of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time. We hold the 90-day filing period to be

> jurisdictional and therefore the employer's failure to plead it did not constitute a waiver. 582 F.2d 1142, 1151.

The court went on to note that "other circuits are split on the issue," *id.*, n. 16, and indicated that the applicable legislative history contained nothing indicating that the time limits of Title VII were not jurisdictional, 582 F.2d 1142, 1151, a view shared by the Ninth Circuit in *Wong v. Bon Marche,* 508 F.2d 1249 (9th Cir. 1975).

Even courts which have, subsequent to *Robbins & Myers, Inc.,* indicated that the tolling doctrine applies to the Title VII time limits have done so gingerly and tentatively, and have indicated some doubt as to the real reach and application of that doctrine, and while recognizing the doctrine, have refused to apply it to cases before them. Such courts, for example, have read *Robbins & Myers, Inc.,* as "leaving open the possibility" of a tolling doctrine in "certain limited cases," *Hart v. J.T. Baker Chem. Corp.,* 598 F.2d 829, 833 (3d Cir. 1979); or have interpreted applicable decisions of this Court as "suggesting" that Title VII's requirements are not a jurisdictional prerequisite in the "same sense" as other jurisdictional requirements, *Chappell v. Emco Mach. Works Co.,* 601 F.2d 1295, 1298 (5th Cir. 1979); or have decided only that the applicable authorities permit a court to "assume *arguendo*" that the Title VII time limits are subject to "potential" equitable tolling, *Cottrell v. Newspaper Agency Corp.,* 590 F.2d 836, 838 (10th Cir. 1979).

The *Cottrell* case, *supra,* highlights, moreover, the extent to which this Court's evenly divided decision in *Shell Oil Co. v. Dartt,* 434 U.S. 99 (1977), *rehearing denied,* 434 U.S. 1042 (1978), *affirming per curiam by an equally divided court, Dartt v. Shell Oil Co.,* 539 F.2d 1256

(10th Cir. 1976), has created further confusion. While the Tenth Circuit in *Dartt* itself had squarely decided the closely parallel issue of the existence of a tolling doctrine for purposes of age discrimination claim periods, the Tenth Circuit, later *citing* this Court's subsequent decision in *Robbins & Myers, Inc.*, and this Court's decision in *Dartt*, retreated in *Cottrell*, and decided to assume the existence of the tolling doctrine in the Title VII context only "*arguendo.*" 590 F.2d 836, 838. This, while the Sixth Circuit, on the basis of its reading of the same decisions of this Court, was preparing to push the doctrine sharply ahead in Title VII actions.

CONCLUSION

The panoply of Circuit Court decisions with respect to both the existence of the tolling doctrine in the Title VII statutory scheme, and the reach and application of such a doctrine if it is appropriate, are confused, hesitant, and conflicting in approach.[2] Indeed, even the decision relied on so heavily by the Sixth Circuit in the instant case, *Bethel v. Jefferson*, 589 F.2d 631 (D.C. Cir. 1978), reached the result it did only by piecing together various positions taken by various members of the Court in a collection of separate decisions. *See* 589 F.2d 631, 641-42, n. 64.

The Circuits, and Title VII litigants as well, need something more than a patchwork of language from separate decisions and Justices to guide them in this area. The need for resolution of these issues is at least as great today as it was when this Court granted certiorari in *Shell*

[2] The same problems which have produced this state of affairs will, it is suggested, affect decisions of those additional Circuits which have not, subsequent to *Robbins & Myers, Inc.* confronted this issue.

Oil Co. v. Dartt. The instant case is a perfect vehicle for addressing these basic issues, for as the dissenting opinion below points out (App. 13a, 14a), the Sixth Circuit's decision extends the tolling doctrine to materially different circumstances than even other courts endorsing the doctrine have viewed as justifying resort to the doctrine.

This Court should grant certiorari to definitively resolve the basic question of whether the tolling doctrine is appropriate to the Title VII statutory scheme, and, if so, to resolve what the reach and application of that doctrine are.

Respectfully submitted,

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May 21, 1980

APPENDIX

APPENDIX A

THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

OLGA J. FOX *Plaintiff* v. EATON CORPORATION, *Defendant*	**CIVIL ACTION NO. C77-175** **MEMORANDUM AND ORDER**

KRUPANSKY, J.

This is a civil rights proceeding instituted pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Defendant has filed a Motion to Dismiss for lack of jurisdiction over the subject matter. Upon review of the pleadings herein, the Court concurs that it is not possessed of jurisdiction and must therefore dismiss the action with prejudice, pursuant to Rule 12(h)(3), Fed. R. Civ. P.

The Complaint, which would seem to assert a claim for unlawful discrimination on the basis of sex, does not even allege that plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) or otherwise state the nature of the allegations asserted in any such charge. However, plaintiff does allege in the Complaint that she received a Notice-to-Sue Letter from the EEOC on December 6, 1974.

The Complaint further avers that plaintiff commenced a civil action in the Court of Common Pleas, Cuyahoga County on October 23, 1973, but fails to state the nature of said action,

the name of the defending party or the relation that the Common Pleas action bears to the instant proceeding. Plaintiff avers that the commencement of the Common Pleas action tolls the statute of limitations on her Title VII claim filed in this Court.

The Complaint alleges that the state action was tried and was appealed to the Ohio Court of Appeals for the Eighth Appellate District, but fails to allege the name of the successful party or the nature of that Common Pleas Court decision. Finally, plaintiff asserts that the state action was appealed to the Supreme Court of Ohio, which found "that the Ohio Court had no jurisdiction over the subject matter of the cause, reversed the finding of the Court of Appeals and dismissed the cause otherwise than on the merits." The Court infers from the vague allegations of the Complaint that the state action proceeded on the basis of a Title VII claim. No where in the Complaint, however, does plaintiff draw any factual relation between that cause of action and the one presently before this Court.

The aforementioned decision of the Supreme Court of Ohio, the citation to which was furnished by defendant, (*Fox* v. *Eaton Corp.*, 48 Ohio St. 2d 236 (1976)), determines, without discussing the underlying cause of action, that state tribunals are not possessed of jurisdiction over actions instituted pursuant to 42 U.S.C. §2000e. In support of her contention that the statute of limitations on her Title VII action is tolled by the commencement of the Common Pleas suit, plaintiff asserts that that state courts enjoy concurrent jurisdiction with federal courts over Title VII actions. While this Court does not sit as an appellate court and does not here pass upon the propriety of the decision of the Supreme Court of Ohio in *Fox* v. *Eaton Corp.*, *supra*, the Court does pause to observe the soundness of that decision. To the federal courts alone is assigned the power to enforce complaince with Title VII. *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Pettway* v.

American Cast Iron Pipe Company, 411 F.2d 998 (5th Cir. 1969).

The Court furthermore determines that at the time this Complaint was filed on February 18, 1977, almost 2½ years had elapsed since plaintiff's receipt of her Notice-to-Sue letter on December 6, 1974. Pursuant to 42 U.S.C. §2000e-5(f)(1), plaintiff must commence her action in the district court within 90 days of the receipt of the Notice-to-Sue letter or be forever barred from litigating her claim. This provision is jurisdictional and the failure to file a complaint within the prescribed time period deprives the Court of jurisdiction over the subject matter. *Hinton* v. *CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975); *DeMatheis* v. *Eastman Kodak Company*, 511 F.2d 306 (2d Cir.), modified, 520 F.2d 409 (2d Cir. 1975); *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974); *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Genovese* v. *Shell Oil Company*, 488 F.2d 85 (5th Cir. 1973); *Huston* v. *General Motors Corporation*, 477 F.2d 1003 (8th Cir. 1973); *Goodman* v. *City Products Corp., Ben Franklin Division*, 425 F.2d 702 (6th Cir. 1970).

The 90-day limitation is adhered to strictly, and will not be tolled, particularly under circumstances such as those presented here, where the Complaint was erroneously prosecuted in a court that lacked jurisdiction. Only after a final adverse ruling in that action did plaintiff institute proceedings in this Court. Plaintiff's error cannot be corrected by simply refiling the action in another court.

Even in those circumstances when a Title VII litigant has properly instituted proceedings in a district court of the United States within the statutory time limit, and that action is subsequently dismissed then refiled, the 90-day period of limitations is not tolled by the filing of the original Complaint. Nor is the filing date of the second Complaint retroactive to the filing date of the original Complaint. *Hall* v. *Kroger*, 520 F.2d 1204 (6th Cir. 1975); *Cleveland* v. *Douglas Aircraft Company*,

509 F.2d 1027 (9th Cir. 1975); *McClendon* v. *North American Rockwell,* 2 FEP Cases 593 (C.D. Calif. 1970).

Therefore, upon consideration, the Court finds that plaintiff did not file her Complaint within the 90-day statutory limit, that the period of limitation was not tolled by the state court action and that this Court consequently lacks jurisdiction over the subject matter of the Complaint. Accordingly, defendant's Motion to Dismiss is granted and the Complaint is hereby dismissed with prejudice.

IT IS SO ORDERED.

KRUPANSKY, J.

APPENDIX B

No. 77-3374

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OLGA J. FOX,

Plaintiff-Appellant,

v.

THE EATON CORPORATION,

Defendant-Appellee.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed February 21, 1980

Before: CELEBREZZE, BAILEY BROWN and JONES, Circuit Judges.

BAILEY BROWN, Circuit Judge, delivered the opinion of the Court in which JONES, Circuit Judge, concurred. CELEBREZZE, Circuit Judge, (pp. 9-10) delivered a separate dissenting opinion.

BAILEY BROWN, Circuit Judge. The appellant, Olga J. Fox (Fox), appeals from a judgment of the district court dismissing her Title VII action based on alleged sex discrimination. The district court held, on a motion to dismiss, that, since Fox had failed to commence this action in federal court within ninety days of receiving her right-to-sue letter, her action must be dismissed as untimely filed.

I

Fox was employed by the appellee, the Eaton Corporation (Eaton), from 1942 until 1972. On August 30, 1972, Fox was released from employment when the plant at which she was working was closed. In October, 1973, she brought an action in an Ohio state court claiming Eaton had breached the collective bargaining agreement. Fox alleged that Eaton had improperly computed her credited service in determining her eligibility for early retirement benefits.

Sometime in 1974, shortly before trial, Fox sought to amend her complaint to include a claim based on Title VII of the Civil Rights Act of 1964. The amendment alleged a claim of sex discrimination by alleging, *inter alia*, that she had not been given service credit for the time taken as maternity leave. The amendment was allowed when Fox received a right-to-sue letter in December, 1974.[1] Prior to trial the parties agreed to stipulate that Fox had a right to bring a Title VII action in the state court. Following a trial on the merits, the state court entered a judgment in favor of Eaton. That decision was affirmed by one of the Courts of Appeal of Ohio. On appeal to the Supreme Court of Ohio, that court *sua sponte* held that state courts lack jurisdiction over Title VII actions. Accordingly, the Supreme Court of Ohio reversed the decision of the lower court and dismissed Fox's action for lack of jurisdiction. The Ohio Supreme Court decision was rendered on December 15, 1976. *Fox* v. *Eaton Corp.*, 48 Ohio St. 2d 408 (1976).

On February 18, 1977, Fox filed this Title VII action in federal district court alleging essentially the same facts that had

[1] It is unclear from the record in this case not only when the alleged act of discrimination occurred but also when Fox filed her discrimination charge with the EEOC. The district judge took note of the fact that the complaint did not allege the filing of a charge with the EEOC or the date thereof but did not dismiss the complaint on this basis. Accordingly, we cannot and do not determine whether the plaintiff filed a discrimination charge within 180 days of the alleged act of discrimination. That issue will have to be determined by the district court on remand.

been the basis of her previous state court action.[2] Eaton filed a motion to dismiss claiming that Fox had not commenced the action within ninety days of receiving her right-to-sue letter as required by 42 U.S.C. § 2000e-5(f)(1). The district court, in granting Eaton's motion, concluded that the time periods established under Title VII were jurisdictional in nature and therefore could not be tolled. The district court implied that even if the time periods were subject to tolling, such tolling would not be proper under the circumstances of this case.

II

Since the district court's decision, this court has held that the Title VII time periods "are jurisdictional in the sense that that phrase is used in relation to statutes of limitations and equitable principles should apply in circumstances which warrant their application." *Leake* v. *University of Cincinnati,* 605 F.2d 255 (6th Cir. 1979).[3] *See also Hart* v. *J.T. Baker Chemical Corp.,* 589 F.2d 829 (3rd Cir. 1979); *Laffey* v. *Northwest Airlines, Inc.,* 567 F.2d 429, 475 (D.C. Cir. 1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.,* 516 F.2d 924 (5th Cir. 1975).[4] The issue presented in this appeal is whether the

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[2] If the ninety-day limitation was tolled during the pendency of the Title VII action in the state courts, this Title VII action was timely filed in federal district court.

[3] This decision in *Leake,* however, was clearly presaged by earlier decisions of this court which were cited and relied upon therein.

[4] In each of these cases, the court held that equitable principles may warrant the tolling of the time period for filing a discrimination charge with the EEOC. We believe that the rationale of these cases is equally applicable to the time period for commencing a civil action. *Contra, Dunlap* v. *Sears, Roebuck & Co.,* 21 FEP Cases 417 (E.D. Pa. 1979). *Dunlap* cites *Goodman* v. *City Products Corp.,* 425 F.2d 702 (6th Cir. 1970), as authority for the proposition that this time limitation cannot be tolled. Actually, *Goodman* only holds that the statutory language that the action "may" be filed in ninety days is mandatory and not directory but also recognizes the possibility of tolling under proper equitable circumstances. If anything, this time period is more in the nature of a statute of limitations than the time period for filing a discrimination charge.

facts of this case justify the application of equitable principles of tolling.

In *Leake* v. *University of Cincinnati, supra,* this court held that affirmative representations by the employer which cause the employee to delay in filing discrimination charges with the EEOC are sufficient to toll the applicable Title VII time period. Other courts which have considered whether the Title VII time period for filing an action may be tolled have indicated that deception may toll this period. *See Cottrell* v. *Newspaper Agency Corporation,* 590 F.2d 836 (10th Cir. 1979); *Trader* v. *Fiat Distributors, Inc.,* 20 FEP Cases 1148 (D. Del. 1979). *See also Ceromette* v. *General Motors Corporation,* ____ F.2d ____, NO. 77-1184 (6th Cir. December 3, 1979), which deals with a late filing of a charge with the EEOC. Conduct by the *employer* which reasonably leads the employee to delay in pursuing his claim certainly presents the clearest and the most justifiable example of a situation in which Title VII time periods should be tolled. *See Smith* v. *American President Lines, Ltd.,* 571 F.2d 102, note 12 at 109 (2d Cir. 1978). But courts have not hesitated to at least consider and in some circumstances to apply equitable tolling principles in contexts in which the employer's conduct has not caused the employee to delay in pursuing his claim. *See Chappell* v. *Emco Machine Works Company,* 601 F.2d 1295 (5th Cir. 1979) (Title VII time periods not tolled when employee relied on statements of employee of state agency that complaint with EEOC had been filed for her, but see dissent at 1304); *Hart* v. *J.T. Baker Chemical Corp., supra* (time periods not tolled when employee knew basic facts supporting discrimination charge at the time of her termination); *Smith* v. *American President Lines, Ltd., supra,* (tolling of time periods not appropriate simply because employer failed to post, as required by statute, notice to employees of rights under Title VII); *Page* v. *U.S. Industries, Inc.,* 556 F.2d 346 (5th Cir. 1977), *cert. denied,* 434 U.S. 1045 (1978) (Title VII time period for filing a civil complaint tolled on the basis of a misleading letter written by the EEOC); *Reeb*

v. *Economic Opportunity Atlanta, Inc., supra,* (Title VII time period for filing a discrimination charge tolled until facts supporting discrimination were apparent or should have been apparent to employee). Without categorizing or defining the various circumstances which might warrant the tolling of the Title VII time periods, we conclude that such tolling is appropriate, even in the absence of any misleading conduct by the employer, when the employee files a timely Title VII action in a court and there exists a reasonable legal theory for invoking the jurisdiction of that court.[5]

The Supreme Court has in two contexts held statutes of limitations to be tolled during the pendency of an event or condition which satisfied the underlying purposes of the particular statute of limitations. *See Johnson* v. *Railway Express Agency,* 421 U.S. 454, 475 (1975) (Marshall, J., dissenting). Thus, the Court has held that when a plaintiff files an FELA action in a state court with proper jurisdiction and that action is subsequently dismissed for improper venue, the FELA statute of limitations is tolled during the pendency of the state action. *Burnett* v. *New York Central Railroad Company,* 380 U.S. 424 (1968). In addition, the Court has held that the commencement of a class action tolls the applicable statute of limitations for every member of the alleged class at least until such time as the court decides the class certification issue. *American Pipe & Construction Company* v. *Utah,* 414 U.S. 538 (1974). *See also United Airlines* v. *McDonald,* 432 U.S. 385 (1977). In each of these cases, the underlying purpose of the particular statute of limitations was satisfied by the filing of the original action in that the defendant received timely notice of the statutory claim and the plaintiff displayed diligence in

[5] Fox contends that Eaton misled her by stipulating that the state court had jurisdiction. It is well established that two parties cannot create jurisdiction by stipulation. But more importantly, it is not alleged that Eaton made any misrepresentations which caused Fox to file her action in state court. That decision was her own. Accordingly, we cannot consider this case to be one involving misleading conduct by the employer.

asserting his or her rights. In neither case was the defendant subjected to any unfairness.[6]

This case is obviously distinct from either *Burnett* or *American Pipe* in that Fox's original state action was dismissed for lack of jurisdiction. We believe that, as a general matter, the filing of an action in a court that clearly lacks jurisdiction will toll the statute of limitations. But in this case, the lack of jurisdiction in the state court was far from clear. Those courts that have directly confronted this issue have reached conflicting conclusions.[7] *See Peterson* v. *Eastern Airlines,* 20 FEP Cases 1322 (W.D. Texas 1979); *Bennun* v. *Board of Governors,* 413 F.Supp. 1274 (D.N.J. 1976); *Peper* v. *Princeton University, Board of Trustees,* 77 N.J. 55, 389 A.2d 465 (1978); *Vason* v. *Carrano,* 31 Conn.Super. 338, 330 A.2d 98 (1974) (holding state courts have concurrent jurisdiction). *See also Dickinson* v. *Chrysler Corp.,* 458 F.Supp. 43 (E.D. Mich. 1978); *Fox* v. *Eaton Corp.,* 48 Ohio St. 2d 408 (1976); *Lucus* v. *Tanner Bros. Contracting Corp.,* 10 FEP Cases 1104 (Arizona 1974) (holding federal courts have exclusive jurisdiction). At the time Fox filed her action in state court, there was no controlling decision, and particularly no decision by the Supreme Court of Ohio, that would indicate that federal courts have exclusive jurisdiction over Title VII actions. Given the absence of any such controlling decision and given the conflicting decisions reached by

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[6] In *Johnson* v. *Railway Express Agency, supra,* the Supreme Court held that the statute of limitations applicable to actions under 42 U.S.C. §1981 was not tolled by the pendency of a Title VII proceeding. In *International Union of Electrical Radio and Machine Workers, Local 790* v. *Robbins & Myers, Inc.,* 429 U.S. 229 (1976), the Court held that the Title VII time period was not tolled during the pendency of grievance proceedings. We believe that both *Johnson* and *Electrical Workers* are distinguishable from this case in that in those cases the defendant did not receive timely notice of the specific statutory claim that was subsequently asserted by the plaintiff.

[7] We need not and therefore do not consider whether federal courts have exclusive jurisdiction over Title VII actions. We only note that the question is not an easy one, particularly given the absence of any language in the statute specifically excluding jurisdiction from the state courts. *See Dowd Box Co.* v. *Courtney,* 366 U.S. 502 (1962).

other courts, we do not believe that Fox should be prejudiced for having adopted the jurisdictional theory which the court ultimately decided not to accept.

The Court of Appeals for the District of Columbia recently reached a similar conclusion in an analogous situation. In *Bethel* v. *Jefferson,* 589 F.2d 631 (D.C. Cir. 1978), the D.C. Circuit considered for the first time whether employees of the District of Columbia were required to follow the procedures of the Civil Service Commission or the procedures of the EEOC. Even though the court determined that the particular plaintiffs in that case were required to file discrimination charges with the EEOC, it did not penalize them for having resorted to the Civil Service Commission.

> [S]urely it would be hypertechnical, if not downright unrealistic, to require nonlawyers to study the statute, its legislative history and its administrative interpretations and predict accurately which of two quite reasonable constructions of the unclear language a court will adopt.

589 F.2d at 642.

We believe that it would be equally unrealistic and equally inappropriate to force an employee even with the assistance of an attorney to predict which one of two reasonable jurisdictional theories a court may adopt.

Accordingly, we hold that Fox's commencement of a Title VII action in state court was sufficient to toll the ninety day period within which she was required to commence a civil action. This result is consistent with the rationale of the Supreme Court in *Burnett* v. *New York Central Railroad Company, supra* and *American Pipe & Construction Company* v. *Utah, supra.* Certainly the purpose underlying the particular

time period was satisfied.[8] Eaton was not confronted by a stale claim. Nor was it deprived of an opportunity to preserve the appropriate evidence. Throughout these proceedings, Fox has exercised great diligence, however unartfully, in pursuing her claim. Her only misfortune lay in the selection of an inappropriate forum. That selection, however, was not without a reasonable basis. Under these circumstances, we think the tolling of the ninety day time period is consistent not only with the specific purpose of that time period but also with the general remedial purposes of Title VII.

As has been pointed out herein, many of the decisions holding that the Title VII time periods are in the nature of statutes of limitations and therefore can be tolled (and particularly *Leake, supra*), are of recent vintage and were not available at the time this action was dismissed. Moreover, the complaint herein was very unartfully drawn and supported at the time the motion to dismiss was presented. For these reasons, we can well understand why the district judge reached the conclusion that the action should be dismissed as time barred.

Our holding in this case is not a broad one. We only hold that the ninety day time limitation for filing a civil action is

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[8] The general purposes of statutes of limitations were outlined by the Supreme Court in *Burnett* v. *New York Central Railroad Company, supra* at 428:

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

tolled by filing a civil action within ninety days in a state court which plaintiff reasonably believed possessed subject matter jurisdiction. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings.

CELEBREZZE, J., dissenting. With due deference to the views of the majority, I must respectfully dissent.

I adhere to the principles articulated by this court in *Leake* v. *University of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979), that "Title VII time limitations are jurisdictional in the sense that that phrase is used in relation to statutes of limitations and equitable principles should apply in circumstances which warrant their application." I disagree, however, with the majority view that the present case justifies the exercise of such equitable power and the tolling of the 90-day time period.

In my view, the factual context of *Leake, supra*, justifying the tolling of the time limitations is eminently distinguishable from the present case. In *Leake*, we held that affirmative representations by an employer which cause an employee to delay filing his discrimination charges with the EEOC are sufficient equitable considerations to justify a tolling of the time periods. In the present case, we have no such "foul play" on the employer's behalf which should preclude him from raising the time period defense.

It is well established that the tolling of statutory periods on equitable grounds is usually very much restricted. *International Union of Electrical Radio and Machine Workers, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Geromette* v. *General Motors Corp.*, No. 77-1184 (6th Cir. December 3, 1979). In *Robbins & Myers*, the Supreme Court implied that tolling might be appropriate only where the defendant has actively misled the plaintiff respecting the cause of action, where plaintiff has in some extraordinary way been prevented from asserting his rights, or where the plaintiff has raised the precise statutory claim in issue in a court of competent jurisdiction but has mistakenly done so in a state court without proper

venue. *Id.* at 237 n.10 and accompanying text; *Chappel* v. *Emco Machine Works Co.*, 601 F.2d 1295, 1302-03 (5th Cir. 1979); *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978).

From my reading of the record, I cannot conclude that the present case falls within any of the above instances. As already stated above, and the majority agrees, there is no evidence that defendant-appellee engaged in any conduct which resulted in appellant's filing of her claim in state court. *See ante* n.5 at 5. Additionally, the record is devoid of any evidence which would lead to the conclusion that appellant has in some extraordinary way been prevented from asserting her rights. *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 429 (1965); *Osbourne* v. *United States*, 164 F.2d 767 (2d Cir. 1947). Nor has appellant filed her claim in a state court of competent jurisdiction which did not have proper venue over her claim. *Burnett, supra*, 380 U.S. at 426-36.

In *Burnett*, the Supreme Court was confronted with a tolling inquiry regarding the three-year statute of limitations under the Federal Employer's Liability Act (FELA). In *Burnett*, the court held that where a timely FELA action is begun in a state court *having jurisdiction*, the defendant is served with process, and the case is dismissed for improper venue, the FELA time limitation is tolled during the pendency of the state suit. Our case is distinguishable from *Burnett*. The court in *Burnett* was careful to limit its holding to those instances where the state court clearly had concurrent jurisdiction, a situation which does not exist in the present case. In light of the policy that equitable grounds justifying tolling should be very restricted, in my view *Burnett* should not be extended to cover the instant case.

Since I find no equitable basis for the tolling of the 90-day time period, I would affirm the judgment of the district court.